United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2303

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2303

BRIEF FOR THE UNITED STATES OF AMERICA

TABLE OF CONTENTS

TABLE OF CASES

PAGE

PAGE

PAGE

United States Court of Appeals

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Docket No. 74-2303

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY TORRES and ROBERTO RIVERA,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Anthony Torres, a/k/a "Tony T," and Roberto Rivera appeal from judgments of conviction entered as to Torres on February 13, 1975 and as to Rivera on October 1, 1974 in the United States District Court for the Southern District of New York, after an eleven day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 74 Cr. 472, filed on May 8, 1974, charged Torres and Rivera and twelve other defendants in Count One with conspiracy to import, sell, distribute and possess with intent to distribute approximately 1/6th of a ton of heroin and cocaine; Torres, and two other defendants, in Count Two with concealing and facilitating the transportation of approximately twenty kilograms of narcotic drugs and in Count Three with the distribution and possession with intent to distribute of ten kilograms of cocaine; and Rivera, and two other defendants, in Count Four with

the distribution and possession with intent to distribute of approximately two or more kilograms of cocaine, in violation of Title 21, United States Code, Sections 173, 174, 812, 841(a)(1), 841(b)(1)(A), 846, 952(a), 960(a)(1), 960(b)(1) and 963.*

Trial commenced against Torres and Rivera on July 29, 1974 and concluded on August 12, 1974 when the jury found both defendants guilty on all counts in which they were charged.

On October 1, 1974, Rivera who had previously been sentenced to 5 years imprisonment for a prior federal narcotics conviction, was sentenced to fifteen years imprisonment on Counts One and Four to be followed by a three year special parole term, seatences to run concurrently, fined $25,000 on each count and assessed the costs of the prosecution by Judge Cannella. Rivera was remanded following his conviction, and is presently serving his sentence.

After filing a series of motions relating to his second offender status which delayed sentencing, Torres was sentenced by Judge Cannella on February 13, 1975 to fifteen years imprisonment and a $25,000 fine on Counts One and Three, and twenty years imprisonment and a $20,000 fine on Count Two (the jail sentences to run concurrently and to be followed by a five year special parole term) and assessed the cost of the prosecution. He is presently serving his sentence, having been remanded after conviction.

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* The indictment includes three additional counts against defendants other than Torres and Rivera. The status of the other twelve defendants is as follows: Enrique Lopez died three days before trial was scheduled to begin; Wladimir Bandera who testified as a government witness at the trial has pled guilty and been sentenced to seven years imprisonment; Juan Carlos Franco, Yolanda Sarmiento, Emilio Diaz-Gonzalez, Nelson Garcia, Miguel Garcia, Olivares, Atilio Boca, Coco Salgado and Alberto Navarro-Diaz are fugitives; Ralph Madonna was severed.

Statement of Facts

The Government's Case

The Government's proof at trial established that Anthony Torres, a/k/a "Tony T", and Roberto Rivera were two of the principal New York contacts and buyers for a group of international narcotics traffickers who during the period from October, 1970 to September, 1971 air freighted from Buenos Aires, Argentina to New York more than 67 kilograms of heroin and 57 kilograms of cocaine concealed in the false backs of ornate antique picture frames. The cast of characters in this international narcotics smuggling network proved at trial consisted of the South American financiers of the operation, the suppliers of the narcotics in Chile and Argentina, the middle men who travelled to New York to receive the narcotics after they had been smuggled through Customs at John F. Kennedy airport and were then responsible for delivering the narcotics to the wholesale buyers in New York and for collecting the money, and finally the contact men and buyers at the wholesale and retail level in New York.

The Government's principal witnesses at trial were convicted participants in the conspiracy: Wladimir Bandera, one of the South America financiers; Alfredo Mazza,* a middle man who travelled to the United States and supervised the delivery of the narcotics and the return of the money; and Lorenzo Cancia, who assisted the middle men in selling the narcotics in New York and who purchased and resold a quantity of the narcotics himself. The Government's fourth accomplice witness was Juan Redondo who had worked for Yolanda Sarmiento, a principal financier

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* Mazza's other international narcotics smuggling activities were examined by this Court in *United States* v. *Arroyo*, 494 F.2d 1316, 1317-18 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3208 (U.S., October 15, 1974).

for the picture frame smuggling operation, and her buyers, including Rivera and Torres, when she trafficked in narcotics in New York in 1970 before she returned to South America and began the picture frame shipments.

The Government's evidence at trial established that Yolanda Sarmiento, Alfredo Mazza and Wladimir Bandera met in Buenos Aires, Argentina in approximately April 1970 and agreed to set up an operation to smuggle narcotics to the United States. At this time Sarmiento stated that she had fourteen kilograms of heroin available for the first shipment (Tr. 240-246, 482-483). Thereafter Mazza travelled to the United States with Juan Carlos Franco, a/k/a "Miguel Aspilche," ("Miguel") to make arrangements for the smuggling and was introduced to a painter, Rodolfo Ruiz, at his apartment at 206 East 75th Street, in Manhattan (Tr. 246-266, 639-640). Ruiz told them that he had previously shipped oil paintings with large antique frames from Portugal to New York which had passed through Customs without being searched and they agreed that concealing drugs in similar frames would be a good way to smuggle drugs from South America to New York (Tr. 266-267). The three men—Mazza, Miguel and Ruiz—then returned to Argentina and prepared the first shipment with Sarmiento (Tr. 268-273). The first shipment (six kilograms of the fourteen Sarmiento had ready) and second shipment (the remaining eight kilos) were successfully completed in October and December, 1970 (GX 72, 73).* In each instance Mazza travelled to New York, received the narcotics after they had been removed from the frames and sold the shipment for $12-$14,000 per kilogram (Tr. 279-306).

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* "GX" refers to Government's Exhibits at trial. The Government introduced the shipping records of the seven shipments of picture frames and was thereby able to pinpoint the dates of the shipments. (Tr. 1333-1350) ("Tr." refers to pages in the trial transcript.)

Subsequently, Mazza went on a vacation to Uruguay for two months and in his absence Miguel Aspilche handled the operation of the third shipment, which formed the basis for Count Two in the indictment. This shipment totalled approximately thirty kilograms. The shipping records indicate that this shipment was exported on December 30, 1970 and delivered to Ruiz in New York on January 12, 1971 (GX 74). Ruiz later told Mazza that the buyer of a part of the narcotics in New York was "Tony T" (Anthony Torres) (Tr. 310-311). When Mazza saw Torres later in New York to negotiate the sale of the fourth shipment in March, Torres told Mazza that Mazza could trust him because shortly before he had done a deal with Miguel, that Miguel trusted him and returned to Buenos Aires before he had collected all the money from him, that Torres had the money available and Miguel would collect it later (Tr. 327-334).

During this period in early January 1971, Lorenzo Cancio, a convicted New York narcotics dealer who testified at trial, was at the El Oviedo restaurant on 14th Street with Enrique Lopez, a contact man for Sarmiento's drug operations in New York. Miguel Aspilche (the associate of Mazza's who, in Mazza's absence sold the third shipment) and Roberto Rivera entered the restaurant and approached Cancio and Lopez. Rivera, Miguel and Lopez then excused themselves from Cancio and conferred in the rear of the restaurant (Tr. 812-814). After 30 minutes, Rivera, Miguel and Lopez returned to the front of the bar and Rivera asked Cancio to accompany him in his automobile because Rivera had some money in his car, and he wanted to make sure he got back to his bar (The Intimate Lounge) safely with the money (Tr. 814-817). Upon leaving the restaurant and while driving to Rivera's bar in the Bronx, Rivera told Cancio that the guy with Rivera and Lopez in the bar was the "connection" and that Cancio had the opportunity to make some money if he made a relationship with him (Tr. 814-816). A few

days later Cancio met Lopez and Lopez confirmed what Rivera had indicated, that he (Cancio) could purchase narcotics from Miguel but that he would have to pay Lopez (as the man who had made the connection) $500 for each kilo, the same amount given by Roberto (Rivera) and Tony T for each kilo (Tr. 817-819).

Subsequently, Cancio was asked by Lopez as a favor to him to have Emilio Diaz-Gonzalez (who was Yolanda Sarmiento's common-law husband (Tr. 6, 10) stay at Cancio's girl friend's apartment on West 96th Street for a few weeks (Tr. 821-825). Cancio agreed, and while Emilio was in the apartment, Miguel Aspilche came to the apartment and spoke with Emilio about money and cocaine (Tr. 837-842). Lopez also visited the apartment on a number of occasions (Tr. 825-828), as did Tony Torres, who came to complain to Emilio about the fact that he had not been paid back the $25,000 in cash which he had given Sarmiento in advance for the cocaine which had been lost, and said he would take repayment in cash or coke (Tr. 834-835). On a second visit to the apartment by Torres, Emilio paid Torres $4,000 of the money owed, Emilio said they wanted to help Cancio, and Torres said that thereafter, whatever merchandise was sent to the United States, Torres and Cancio would work it together (Tr. 844-847).

In February 1971, Cancio drove Emilio to California where Emilio was able to escape from the United States into Mexico with the assistance of Miguel Aspilche. Before parting from Cancio, Miguel told him that when he returned to the United States again with the narcotics he would look Cancio up (Tr. 848-856, 878-883).

In the meanwhile, in March, 1971, back in Argentina, Mazza had returned from his vacation and was, with Yolanda Sarmiento, organizing the fourth shipment of narcotics in picture frames (Tr. 308-310, 314-316). Before arranging for this shipment, Mazza met with Roberto

Cristobal, who had been introduced to him previously by Sarmiento as one of her assistants in New York. Cristobal suggested that he should help him by selling the next shipment to Tony T, who in turn would pay Cristobal a commission. Mazza then obtained ten kilograms of heroin which, together with three kilograms of cocaine received from Sarmiento, he packed in the picture frames which were subsequently exported on March 21, 1971 and delivered to Ruiz in New York on April 16, 1971 (GX 75; Tr. 308-310, 314-316, 324-327). Mazza then flew to New York and met with Cristobal and Tony T to arrange the sale (Tr. 328-331). Tony T told Mazza that Mazza could trust him because he (Tony T) had previously done the deal with Miguel and that he (Tony T) was reluctant to advance the money for the narcotics because he had lost the $20,000 he had advanced to Sarmiento for an earlier shipment of drugs which had been seized by the police (Tr. 331-332). Tony T agreed to make the purchase and to have the money ready at the time the narcotics were delivered by Cristobal (Tr. 332-334), but Cristobal later, after receiving the narcotics and going to meet with Tony T to deliver them to him, told Mazza that Tony T had not had the money ready. Mazza sold the narcotics to another buyer (Tr. 334-337). After receiving the payment and paying commissions to Ruiz and Cristobal, Mazza returned to Buenos Aires (Tr. 337-339). A short time later Mazza and Cristobal met again in New York with Torres and negotiated the sale of an additional quantity of heroin, which sale also was aborted (Tr. 345-351).

Meanwhile, Miguel, having grown dissatisfied with his portion of the earnings from the picture frame deals with Sarmiento, approached Bandera, whom he had met through Sarmiento (Tr. 494-486, 499). Bandera agreed to supply narcotics for the picture frame smuggling operation (Tr. 493-496, 503), and he subsequently obtained forty kilograms of cocaine which he and Miguel packed in the picture frames and which Miguel delivered to the shipper

in Buenos Aires (Tr. 503-515). Bandera testified that he purchased the cocaine from a supplier in Chile, for about $3,500 per kilo, and that he received delivery in a hotel room in Mendoza, Argentina. Before paying for the cocaine Bandera, who was an experienced cocaine dealer, tested the cocaine to confirm its quality (Tr. 503-510). This fifth shipment, which formed the basis for Counts Three and Four, was exported on May 5, 1971 and delivered to Ruiz in New York on May 19, 1971 (GX 76; Tr. 510-515).

Once the frames had been shipped, Miguel returned to New York to receive the cocaine for delivery to the buyers (Tr. 516-517). When Miguel came to New York to look for Cancio, he could not find him, so Miguel instead went directly to Lopez (Tr. 894-896). Cancio testified that Miguel said he sold the last ten kilograms to Torres, leaving only one and three-quarter kilograms which he sold to Cancio at the standard price of $11,000 per kilo (Tr. 896-901) on 75th Street and Third Avenue (at the corner near Ruiz' apartment) (Tr. 897-899, 901). Subsequently, still prior to May 22 when Cancio was arrested, Miguel asked Cancio to take him to Roberto Rivera's bar (Tr. 904-906, 932, 933). After Miguel and Cancio had a drink with Rivera, Rivera went to the rear of the bar and came back with a "ten pound" paper bag full of money which he gave to Miguel. Miguel opened the bag and looked at the money. He then took out of his pocket a small book to figure out Rivera's account and Miguel said that Rivera now owed him $16,000 (Tr. 906-910). Miguel then said he had to be out of town for a few days, so Cancio would collect the money. Rivera replied "All right" (Tr. 906). Before leaving New York, Miguel also asked Cancio to tell Torres to have ready the $80,000 that Torres still owed him for the cocaine when Miguel returned from Miami. Cancio then met with Torres and gave him the message (Tr. 919, 920, 923-924). A day later Cancio returned to Rivera's bar to pick up the $16,000 from Rivera in a paper bag (Tr. 921-923).

The next day, May 22, Cancio was arrested after selling one-half kilogram of the one and three-quarter kilograms he had received from Miguel to other persons (Tr. 932-937). Thereafter, Miguel returned to New York and later told Bandera that except for that amount owed by Cancio and a smaller amount owed by Lopez, he had collected the rest of the money owed to him. Miguel then returned to Buenos Aires where he reported the success of the operation to Bandera (Tr. 518-519, 522-524).

In Buenos Aires, Miguel told Bandera that the buyers in New York, who included Tony T and Lopez, preferred heroin rather than cocaine (Tr. 518, 524-525), so Bandera and Miguel obtained twenty-five kilograms of heroin and five kilograms of cocaine which they shipped in the sixth picture frame shipment from Buenos Aires to Ruiz on July 16, 1971 (GX 77; Tr. 524-525, 527-536). Once the shipment had left Buenos Aires, Bandera and his family and Miguel went to Los Angeles, where they met with Cancio to discuss the sale of the shipment (Tr. 535-541). Anthony Torres also went to Los Angeles. There Torres met with Cancio in an effort to locate Miguel and obtain the narcotics from this shipment. Cancio, however, unbeknownst to Miguel, Bandera or Torres, was at that time giving information to federal narcotics agents who accompanied him to Los Angeles and observed his meetings with Torres and with Miguel and Bandera (Tr. 945-966, 1231-1240).

Thereafter, Cancio and Torres returned to New York (Tr. 968-970). In New York, Cancio met with Miguel and assisted Miguel in selling the twenty-five kilograms of heroin and five kilograms of cocaine which were delivered to Ruiz on August 2, 1971 (Tr. 974-982, 984-1062). Miguel again returned to Buenos Aires and reported to Bandera that the sales had been completed through Cancio and the money received (Tr. 543-548).

By this time Mazza and Sarmiento were organizing the seventh and final shipment (Tr. 352-353). Mazza obtained eighteen kilograms of heroin which were packed

together with nine kilograms of cocaine provided by Sarmiento in four picture frames (Tr. 354-357). This shipment was exported from Argentina on September 23, 1971 (GX 78). On October 6, 1971, however, the frames were intercepted by customs agents in New York who thereafter removed the narcotics from the frames and made a controlled delivery of the frames to Ruiz, whom they arrested as he took delivery of the frames (Tr. 357-359, 633-643, 653-662).

The seizure by customs agents of the seventh picture frame shipment on October 6, 1971 terminated this method of smuggling narcotics from South America by Sarmiento, Mazza, Bandera and Miguel to Ruiz and the buyers Roberto Rivera, Tony Torres, Enrique Lopez, Freddie Aviles * and Lorenzo Cancio in New York. By that time the conspirators had shipped in seven shipments over 144 kilograms of narcotics to New York and been paid at $12,000 to $14,000 per kilo for the heroin and $9,000 to $11,000 per kilo for the cocaine, a total sum in excess of $1,500,000 (Tr. 286, 305, 332, 531).

A description of the events preceding the smuggling in picture frames was provided at trial by Juan Redondo. Redondo described how in 1969 and 1970 he had worked in New York for Yolanda Sarmiento and her husband, Emilio Diaz-Gonzalez. He testified that prior to April 1970, Sarmiento and Emilio lived in New York and received large quantities of narcotics smuggled from South America in demi-johns (wine jugs), planes and boats into the United States (Tr. 63-64, 91-92). He said that the narcotics went for the most part during this period to Tony T, Roberto Rivera and Enrique Lopez ("El Gallego") whom Sarmiento described to Redondo as her best buyers (Tr. 99, 103), and that his job in connection with these buyers

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* Aviles' other narcotics activities were recorded by this Court in *United States* v. *Aviles*, 274 F.2d 179 (2d Cir.), *cert. denied* as *Genovese* v. *United States*, 362 U.S. 974 (1960) and in *United States* v. *Arroyo*, *supra*.

was to assist Sarmiento and Emilio in counting the money received for the narcotics from the buyers, to deposit it in Sarmiento's bank accounts in New York and then carry the money back to Argentina (Tr. 84, 1251). Redondo testified that he saw Tony Torres at the Sarmiento apartment on Adams Street in Brooklyn between seven and ten times bringing money for the purchase of narcotics (Tr. 18, 32, 34-36, 41-46, 58-62). On one occasion he was in the apartment when Torres received six kilograms of cocaine from Sarmiento (Tr. 62-65). Redondo said Roberto Rivera dealt with Yolanda through his brother, Pedro Rivera (Tr. 88). On one occasion Redondo went with Sarmiento to Rivera's bar in the Bronx. Sarmiento went inside and came out saying she had settled her business with Rivera (Tr. 86-88). Redondo was also present with Sarmiento and Enrique Lopez ("El Gallego") on occasions when they discussed her narcotics supply and the price she was charging (Tr. 70-71, 81-83). On one occasion he went with Sarmiento when she delivered a quantity of cocaine to Lopez' apartment and returned from his apartment with a substantial quantity of money in a package (Tr. 70-71, 81-84).

On April 15, 1970 Redondo said that he was arrested with Yolanda Sarmiento and Emilio Diaz-Gonzalez in New Jersey and charged with the possession of 100 kilograms of narcotics found in Sarmiento's New York apartment (Tr. 103-104, 110).* He said that before the arrest Tony Torres had given Sarmiento $50,000 advance payment (Tr. 98-99). Subsequently, Sarmiento returned to Buenos Aires, Argentina. Thereafter, of necessity, she transferred her base of operations to Argentina and with Mazza and Bandera in Buenos Aires began the smuggling in picture frames to the same buyers, Torres, Rivera and Lopez.

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* That arrest, the seizure and the events emanating therefrom formed the basis of the indictment in *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3584 (U.S., April 29, 1975). In that opinion Yolanda Sarmiento is referred to as Elena Risso, and Juan Redondo is referred to as Jorge Rodriguez Araya. Emilio Diaz Gonzalez and Lorenzo Cancio appeared under their true names.

The Defense Case

Neither defendant presented any evidence at the trial.

ARGUMENT

POINT I

The evidence was sufficient to support Rivera's conviction.

A. Rivera was shown by a fair preponderance of the independent evidence to be a member of the conspiracy.

Rivera's first argument in support of reversal is that there was "no non-hearsay evidence to link Rivera with any conspiracy" (Rivera Br. at 4). The record belies this contention. The proof showed Rivera's membership in the conspiracy by his own words and actions in connection with the January and May 1971 shipments.

Lorenzo Cancio testified that during the end of December, 1970, the beginning of January, 1971 he met with Enrique Lopez, a contact man for drugs, at the El Oviedo Bar on 14th Street. After he had spent about 15 minutes with Lopez, Cancio said that Roberto Rivera and Miguel entered the bar, and approached Lopez and Cancio. Lopez, Rivera and Miguel excused themselves from Cancio, went to the rear of the bar and had a conversation out of Cancio's hearing. About one half hour later Rivera, Lopez and Miguel returned to Cancio, and Rivera asked Cancio if he wanted to accompany Cancio to his (Rivera's) bar in the Bronx because Rivera had some money in his car and he wanted to make sure he got back to the bar safely with the money.

In Rivera's car on the way to the Bronx, Cancio told Rivera that he needed to make some money and Rivera said:

> "Well, he said, you have the opportunity to make some money. I (Cancio) say what you mean by that and he (Rivera) told me that the guy you saw with me and with the Gallego (Lopez) in the bar, he is the connection.
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> * * *
>
> "He (Rivera) said, well he is the connection. He (Rivera) said you try to make relationship with him. So I (Cancio) said all right, thank you very much" (Tr. 816).

This conversation is important independent evidence as to Rivera's participation in the conspiracy when considered alone. Its significance and that of Rivera's meeting with Miguel and Lopez at the bar is even greater when it is noted that Miguel was in New York at the time to handle the sale of the third picture frame shipment of drugs. The records of the shipping company reflect that the third shipment of picture frames was exported from Buenos Aires on December 30, 1970 and delivered to the painter, Rodolfo Ruiz, in New York on January 12, 1971 (GX 74).*

The shipping records for the May 1971 shipment of forty kilograms of cocaine show that the shipment was exported from Buenos Aires on May 5, 1971 and delivered to Ruiz in New York on May 19, 1971 (GX 76). Bandera testified that he purchased the cocaine and helped pack the drugs in the picture frames and that Miguel travelled to New York to receive the cocaine from Ruiz and to sell the shipment. A day or two before Cancio's arrest on

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* Mazza testified that he had been on vacation in Uruguay when this shipment was processed, and that Ruiz and later Torres told him that Miguel, who had accompanied Mazza to New York to receive and deliver the October shipment, had been in New York selling the shipment (Tr. 310, 311, 327-334).

May 22, 1971, just at the time that the forty kilograms were delivered from the shipper and Miguel was selling the cocaine, Miguel asked Cancio to take him to see Rivera at Rivera's bar in the Bronx. Miguel and Cancio arrived at the bar, had a drink with Rivera and then Rivera went to the rear of the bar and returned with a paper bag filled with money which he gave to Miguel. (At trial Cancio gestured as to the size of the bag of money and Rivera's counsel said he was speaking of a "ten pound paper bag" [Tr. 908]).

Miguel opened the bag and looked at the money. Miguel then removed from his pocket a small book to figure out Rivera's account, and said that Rivera now owed him $16,000, but that he (Miguel) had to be out of town for a few days, so Cancio would collect the money. Rivera replied "all right" (Tr. 906).

A day later on May 20th or 21st, 1971, Cancio returned to Rivera's bar to pick up the $16,000 for Miguel from Rivera. At the bar, Rivera gave Cancio the $16,000 in a paper bag. This money was later taken by Cancio to his girlfriend's apartment on West 96th Street and used to pay Cancio's bail (Tr. 921-923).

These three incidents, each directly involving Rivera, amply meet the test of *United States* v. *Geaney*, 417 F.2d 116, 1120 (2d Cir. 1969), *cert. denied*, as *United States* v. *Lynch*, 397 U.S. 1028 (1970), that for hearsay declarations of co-conspirators to be admissible against a defendant, that defendant must first be shown to be a member of the conspiracy by a fair preponderance of the evidence independent of the hearsay declarations. See also *United States* v. *Tramunti*, Dkt. No. 74-1550 (2d Cir., March 7, 1975), slip op. 2107, 2141-43; *United States* v. *Santana*, 503 F.2d 710, 713-14 (2d Cir. 1974); *United States* v. *Mallah*, 503 F.2d 971, 975-76 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3515 (March 25, 1975); *United States* v.

D'Amato, 493 F.2d 359, 362-65 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3208 (October 15, 1974); *United States* v. *Manfredi*, 488 F.2d 588, 596-97 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Ruiz*, 477 F.2d 918, 919-20 (2d Cir.), *cert. denied*, 414 U.S. 1004 (1973). See also *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 1202 (1974); *United States* v. *Wisniewski*, 478 F.2d 274, 279-280 (2d Cir. 1973); *United States* v. *Calabro*, 449 F.2d 885, 889-890 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *United States* v. *Calarco*, 424 F.2d 657, 660 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970); *United States* v. *Vasquez*, 429 F.2d 615 (2d Cir. 1970); *United States* v. *Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968).

Rivera argues in his brief, as he did at trial, that with respect to the incidents involving the payment of the paper bag full of money to Miguel by Rivera and of the $16,000 to Cancio, for Miguel, by Rivera, there was no testimony that the defendant said the money was to pay for narcotics, that he could just as well have been buying counterfeit bills or "hot" jewelry and that the evidence at most only showed mere association. This contention is similar to the loansharking argument advanced in *Tramunti*, *supra* at 2142 and the bookmaking argument advanced in *Mallah*, *supra*, 503 F.2d at 975, both of which were found insufficient by this Court. The testimony of Bandera, who saw the cocaine in the frames, and of Cancio who bought some of the cocaine prior to May 22 when he was arrested, and the shipping records, establish that Miguel was in New York between May 19 and May 21, 1971 to receive the cocaine and to sell it. It is possible but utterly unlikely that in the two days while he was selling forty kilograms of cocaine (of which the record shows he sold ten kilos to Anthony Torres and one and three-quarter kilograms to Cancio), he also was selling counterfeit bills

to Rivera for a ten pound bag full of money and $16,000. But there is nothing in the record that could rationally support such an inference. On the very days after the forty kilograms of cocaine were received in New York, Miguel, the seller of the cocaine, received a bag full of money from Rivera, checked his account book and determined Rivera still owed $16,000, and the next day Rivera paid the $16,000 to Cancio for Miguel. It is hard to imagine stronger circumstantial evidence that Rivera was buying narcotics from Miguel than exists here. In any event from Rivera's remarks to Cancio and the incident with Rivera, Lopez, Miguel and Cancio in the El Oviedo Bar in January, when Miguel was in New York at the same time as the January shipment, it is plainly evident that Rivera was fully aware that Miguel was in the narcotics business (Tr. 816). As long as these inferences *could have been drawn* from the non-hearsay evidence, *Geaney* is satisfied. *Tramunti, supra* at 2142.*

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* Rivera also argues that Cancio had such a bad record that his testimony was unreliable and should not be considered. Cancio's credibility however, was tested at trial under vigorous and extensive cross-examination and the jury was properly instructed on the standards to be employed in evaluating his testimony (Tr. 1745-1749). His credibility is not subject to review in this Court. *United States* v. *Koss*, 506 F.2d 1103, 1111 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (April 15, 1975); *United States* v. *Mallah, supra*, 503 F.2d at 981; *United States* v. *Stromberg*, 268 F.2d 256, 266-67 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); *United States* v. *Markman*, 193 F.2d 574, 576 (2d Cir. 1952); *United States* v. *Compagna*, 146 F.2d 524, 526 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945); *United States* v. *Manton*, 107 F.2d 834, 839 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940).

B. The evidence was sufficient to convict Rivera on the substantive count.

Rivera does not argue, and rightly so, that there was insufficient evidence to convict him of conspiracy once the hearsay was admitted. Thus, there was testimony that when Cancio asked Lopez if he could buy some of the cocaine from Miguel, Lopez told him that he could, but he would have to pay Lopez $500 for each kilo, the same amount paid by Torres and Rivera (Tr. 817-819). Lopez' statements directly establish that Rivera was one of the buyers of drugs from the "connection". Rivera, however, contends that there was insufficient evidence to convict him on Count Three, which charged that Rivera, Miguel and Lopez distributed and possessed with intent to distribute approximately two or more kilograms of cocaine on or about May 19, 1971. The argument is without merit.

The law is settled in this district that circumstantial evidence is sufficient to prove substantive violations of the narcotics laws. *United States* v. *Agueci*, 310 F.2d 817, 828 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *United States* v. *Fantuzzi*, 463 F.2d 683, 689 n. 7 (2d Cir. 1972); *United States* v. *Fiotto*, 454 F.2d 252, 254 (2d Cir.), *cert. denied*, 406 U.S. 918 (1972); *United States* v. *Calabro*, 449 F.2d 885, 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *United States* v. *Nuccio*, 373 F.2d 168, 174 n. 4 (2d Cir. 1967), *cert. denied*, 387 U.S. 906 (1968); *United States* v. *Bentvena*, 319 F.2d 916, 927 (2d Cir.), *cert. denied* as *Ormento* v. *United States*, 375 U.S. 940 (1963); *United States* v. *Reid*, 347 F.2d 344, 345 (2d Cir. 1965); *United States* v. *Morello*, 250 F.2d 631, 633-34 (2d Cir. 1957); *see also*, *United States* v. *Jones*, 480 F.2d 954, 960 n. 4 (5th Cir. 1973); *United States* v. *Atkins*, 473 F.2d 308, 314 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973). In *Agueci*, *supra*, this Court held:

> "Just as with any other component of the crime, the existence of and dealing with narcotics may be

> proved by circumstantial evidence; there need be no sample placed before the jury, nor need there be testimony by qualified chemists as long as the evidence furnished ground for inferring that the material in question was narcotics." 310 F.2d at 828.

Moreover, relying on *Agueci*, this Court has made it abundantly clear that circumstantial evidence is sufficient to prove not only the *nature* and *identity* of the drug but also the *quantity* of the narcotic drug when such quantity is in question. *United States* v. *Iacopelli*, 483 F.2d 159, 161 (2d Cir. 1973); *United States* v. *Haynes*, 398 F.2d 980, 987 (2d Cir. 1968), *cert. denied*, 393 U.S. 1120 (1969).

As discussed above, in connection with the conspiracy count, it is plainly inferable (indeed, under the circumstances no other inference makes any sense at all) that Rivera was buying drugs from Miguel and paying for them directly to Miguel and then, after Miguel left for Miami, to Miguel through Cancio. Thus, it was left to the Government to establish the nature of the drugs (cocaine) and the quantity (approximately two or more kilograms).

With respect to the nature of the drugs, in *Agueci*, *supra*, 310 F.2d at 828-829, this Court suggested as acceptable the following categories of circumstantial evidence which the jury could consider in determining whether the defendant imported or had possession of a narcotic drug as charged in a substantive count: (1) the substance was a white powder and was seen by the witness; (2) the white powder substance was personally tested by a witness or the defendant; (3) the secrecy and deviousness with which the transactions were handled; (4) the high price paid in cash for the white powder substance, see also, *Fiotto*, *supra*, 454 F.2d at 254; (5) the lack of complaint on the part of the purchasers; (6) descriptive language used by the witness and defendant in connection with certain transactions; and (7) there was white powder in evidence (from the

conspiracy), that a United States chemist testified was heroin. The Court also pointed to the fact that the defendants had previous transactions in narcotics with the witness.

In the present case there was circumstantial proof of the kind set forth in the *Agueci* tests in connection with the May sale to Rivera. If we trace the shipment back to its source, there is the testimony of Bandera that he saw the cocaine, a white powder (forty kilograms), in Mendoza, Argentina, when he purchased it from the delivery man in the hotel room, and that he, in fact, made chemical tests on the drug to assure himself that it was cocaine. He testified further that he paid over $100,000 for the forty kilos; that with Miguel he had the cocaine packed in antique picture frames which were shipped from Buenos Aires to New York; that once in New York, this white powder was received by Miguel from Ruiz, and sold by Miguel for $11,000 per kilogram (Tr. 503-524). There also is the testimony of Cancio concerning this shipment which he said was either 36 or 40 kilos of cocaine. Cancio described the payment to Miguel by Roberto Rivera of a bag full of money one or two days after the records show the shipment was delivered in New York (May 19, 1971), and payment to Cancio himself by Rivera for Miguel, of $16,000 the next day, the day before Cancio was arrested. Additionally, Cancio himself purchased from Miguel on the corner by Ruiz' apartment, the last 1¾ kilograms of cocaine from this shipment, examined it, and sold it to his buyer (Tr. 894-915).

Beyond this, there is the evidence from the other six picture frame shipments of drugs, including the introduction into evidence of the drugs seized from the seventh shipment, which was circumstantially probative that drugs were involved in the transaction between Rivera and Miguel on or after May 19.

Finally, the quantity (approximately two or more kilograms) is established by the amount of money paid by Rivera. First he paid Miguel in Cancio's presence a ten pound bag full of money, and then he paid Cancio $16,000 for Miguel. According to Cancio and Mazza, the price paid in New York for cocaine was $9,000-$11,000 per kilogram (Tr. 332, 901). The $16,000 alone would have paid for at least 1½ kilograms, and the jury was entitled to infer that the bag full of money at least paid for some amount more.

POINT II

The jury properly found a single conspiracy.

Rivera claims that the evidence showed three alleged separate conspiracies: a Sarmiento-Mazza conspiracy, a Bandera-Miguel conspiracy, and a Raphael-Cabilla conspiracy; and that the admission of the evidence of these separate conspiracies prevented a fair trial on the conspiracy charged in the indictment. The multiple conspiracies argument is plainly without merit.

The Government's proof disclosed a single, ongoing conspiracy whose object was the smuggling of massive quantities of heroin and cocaine from South America into the United States for distribution and sale in this country. During the period of the indictment, which covered seven documented shipments of drugs, the conspiracy had a continuing core membership and a defined modus operandi for smuggling the narcotics which remained unchanged.

While the conspiracy had its origin in 1969, the smuggling plan that was the subject of the indictment was conceived at a meeting in Buenos Aires among Sarmiento, Bandera and Mazza in approximately April 1970. Mazza thereafter brought Miguel Aspilche into the group as another middle man to work with him on handling details of the shipments and to travel to New York to sell the nar-

cotics. The painter, Rudolfo Ruiz, was then brought into the conspiracy to assist with the shipping of the drugs and to receive the loaded picture frames in New York. The first two shipments in October and December 1970 were financed and the drugs supplied by Sarmiento. Mazza and Miguel were the middle men, Ruiz was the receiver of the frames, and Aviles was the New York buyer. For the third shipment, in January 1971, Miguel went alone to New York to sell the drugs because Mazza was on vacation. As before, Ruiz was the receiver in New York. This time, in New York, Miguel met with Enrique Lopez and Roberto Rivera at a bar in New York and sold the drugs to Tony Torres. Thereafter, Mazza returned from vacation and organized the fourth shipment in March 1971 largely by himself, although he received the cocaine for the shipment from Sarmiento. As previously, Ruiz was the New York receiver and Tony Torres was the intended buyer, but when Torres failed to have the purchase money ready on time, Mazza had the narcotics sold again to Aviles. By the time of the fifth shipment in May 1971, Miguel had had a falling out with Mazza and with Sarmiento and he turned to Bandera whom he had met through Sarmiento, and who was aware of the smuggling operation from the original meeting with Mazza and Sarmiento. For this shipment, Bandera obtained the cocaine and Miguel organized the air freight shipment to Ruiz in New York and again travelled to New York and sold the cocaine to Tony Torres, Roberto Rivera and Lorenzo Cancio, the last of whom he had met through Yolanda Sarmiento's husband. The sixth shipment in August 1971 was again financed by Bandera with Miguel again organizing the shipment (which, as in all previous shipments, went to Ruiz in New York), travelling to the United States, and selling the drugs to Cancio who, in turn, sold them to his own buyers.* In connection with

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* Cancio sold part of this shipment to a man named Raphael and part to a man named "Cabilla", which is where Rivera in his brief purports to find a separate conspiracy between Raphael and Cabilla (Tr. 978-990).

this shipment, Tony Torres travelled to California to find Miguel to persuade him to sell the drugs to Torres. The cocaine for the final shipment was again supplied by Sarmiento and Mazza was the organizer. The shipment was sent to Ruiz in New York, and Mazza travelled to New York to oversee the sale, which, of course, never took place because Customs Inspectors seized the frames and the drugs and arrested Ruiz.

In short, the evidence revealed the classic chain conspiracy involved in international smuggling cases, where different persons play different roles in the chain. Here, as in many other cases, the core group remained consistent but the players varied from shipment to shipment as a core member was active in one shipment, inactive in the next and then active again. Clearly, each participant knew from the scope of the venture that others were involved in carrying out the stages in the conspiratorial plan, and this principle unquestionably applies to the buyers, including Torres, who was a participant in at least four of the shipments and Rivera, who knew Miguel and Lopez and told Cancio that Miguel was the "connection" while the first shipment was in New York and who also bought from the fifth shipment. *United States* v. *Tramunti, supra,* slip op. 2136-38; *United States* v. *Mallah, supra,* 503 F.2d at 976, 983-84; *United States* v. *Sperling,* 506 F.2d 1323, 1340-41 (2d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3474 (March 3, 1975); *United States* v. *Ortega-Alvarez,* 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3551 (April 15, 1975), *United States* v. *Sisca,* 503 F.2d 1337, 1345 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3281 (November 11, 1974); *United States* v. *Santana, supra,* 503 F.2d 714-15; *United States* v. *Cirillo,* 499 F.2d 872, 887-88 (2d Cir. 1974); *United States* v. *Arroyo,* 494 F.2d 1316, 1318-1319 (2d Cir. 1973); *United States* v. *Bynum,* 485 F.2d 490, 495 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 903 (1974); *United States* v. *Barrera,* 486 F.2d 333, 337-39 (2d Cir. 1973), *cert. denied,* 416 U.S. 940 (1974); *United States* v. *Cirillo,* 468 F.2d 1233, 1238-1240 (2d Cir. 1972), *cert. denied,* 410 U.S.

989 (1973); *United States* v. *Calabro*, 467 F.2d 973, 982-983 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States* v. *Bentvena*, *supra*, 319 F.2d at 926-929; *United States* v. *Agueci*, 310 F.2d 817, 826-828 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *United States* v. *Aviles*, 274 F.2d 179, 187-190 (2d Cir.), *cert. denied* as *Genovese* v. *United States*, 362 U.S. 974 (1960); *United States* v. *Stromberg*, 268 F.2d 256, 263-266 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); *United States* v. *Rich*, 262 F.2d 415, 417-418 (2d Cir. 1959); *United States* v. *Tramaglino*, 197 F.2d 928, 930 (2d Cir.), *cert. denied*, 344 U.S. 864 (1952); *United States* v. *Bruno*, 105 F.2d 921, 922-923 (2d Cir.), *rev'd*, *on other grounds*, 308 U.S. 287 (1939); see also *United States* v. *LaVecchia*, Dkt. No. 74-2272 (2d Cir., April 4, 1975), slip op. 599.

Finally, the question of single vs. multiple conspiracy was properly placed before the jury by Judge Cannella in his charge (Tr. 1760-1763).

POINT III

The testimony of Redondo was properly introduced.

Both Rivera and Torres claim that reversible error was committed by the admission of the testimony of Juan Redondo-Pedrazas. Redondo testified that in 1969 and 1970, when Yolanda Sarmiento had lived in New York, prior to the commencement in April 1970 of the picture frame smuggling operation, he had assisted her in New York in her narcotics business and that Anthony Torres, Enrique Lopez and Roberto Rivera were then her buyers. Redondo testified specifically about conversations with Sarmiento and about transactions in which drugs were transferred from Sarmiento to buyers or money received from buyers. The testimony was admitted by Judge Cannella only on the issue of the defendants' mental operation and intent. (Tr. 55,

56, 85-86, 1691, 1692, 1741-1743)* Rivera argues that this evidence was improper rebuttal testimony and since Rivera did not take the stand, should have been excluded. Torres argues that there was no issue such as knowledge or identity raised at the trial which would allow evidence of other crimes; that Redondo's testimony was not clear and convincing and that in any event, its probative value was outweighed by its prejudicial effect. The arguments are without merit. The testimony was properly introduced as a prior similar act. In addition, it was probative evidence of the existence, scope and purpose of the conspiracy charged and was admissible to show its background and development.**

The law is settled in this Circuit that testimony concerning other crimes is "admissible if it is relevant for some purpose other than merely to show a defendants' criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value." (cases cited). *United States* v. *Papadakis*, 510 F.2d 287,

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* Torres in his brief (page 16) claims that Judge Cannella instructed the jury that the evidence of other crimes, if accepted was probative of defendants' "proclivity" to violate the law. In fact, the remark was made at the side bar outside the hearing of the jury and was as follows:

> "I am not going to make this July 1970 (the date alleged in the indictment as the beginning of the conspiracy) so not a single bit of testimony can come in before this. It shows a proclivity on his part, whether or not he is acting wilfully or does it knowingly. I am going to allow some of this testimony in reasonable limits" (Tr. 14).

** Torres in his brief refers to Redondo as a surprise Government witness. To assure that there was no prejudice to the defendants from "surprise", Judge Cannella had Redondo kept in court and made available for cross-examination throughout the trial. After being cross-examined extensively when he first testified, Redondo was accordingly recalled for further cross-examination seven trial days later at the end of the Government's case (Tr. 48, 115, 119-200, 1243-1322).

294 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3584 (April 29, 1975); see also *United States* v. *Gerry,* Dkt. No. 74-2100 (2d Cir., March 28, 1975), slip op. 2583, 2599. Here it is plain that the evidence was not offered solely to prove criminal character.

The challenged evidence here reflected "a pattern of conduct of which the crime charged [was] a part." *United States* v. *Blassingame,* 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied,* 402 U.S. 945 (1971), and constituted proof of a "system of criminal activity in which appellants participated." *United States* v. *Deaton,* 381 F.2d 114, 118 (2d Cir. 1967). Redondo's testimony concerning the events occurring before July, 1970 was relevant to show appellants were "continuing along the same line" in importing, receiving and selling narcotics as specifically alleged in the indictment. *United States* v. *DeSapio,* 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied,* 402 U.S. 999 (1971); *United States* v. *Bonanno,* 467 F.2d 14, 17 (9th Cir. 1972), *cert. denied,* 410 U.S. 909 (1973). As this Court held in *Papadakis*:

> "The charge of conspiracy to commit criminal acts always requires proof of a course of conduct that will circumstantially prove the corrupt agreement. There is no more convincing proof to a jury than that of a pattern of conduct which unfolds before their eyes." 510 F.2d at 294-95.

Furthermore, this testimony of events which immediately preceded the date charged in the indictment as the beginning of the conspiracy was admissible as showing the existence, purpose, scope, background and development of the conspiracy among the various participants in South America and New York. *United States* v. *Papadakis, supra,* 510 F.2d at 294-95; *United States* v. *Cioffi,* 493 F.2d 1111, 1115 (2d Cir. 1974); *United States* v. *Cohen,* 489 F.2d 955, 949-950 (2d Cir. 1973); *United States* v. *Del Purgatorio,* 411 F.2d 84, 86-87 (2d Cir. 1969); *United States* v.

Costello, 352 F.2d 848, 854 (2d Cir.), *rev'd on other grounds*, as *Marchetti* v. *United States*, 390 U.S. 39 (1968); see also *United States* v. *Turcotte*, Dkt. No. 74-2380 (2d Cir. April 17, 1975), slip op. 2957 at 2965; *United States* v. *Colosurdo*, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972).

The picture frame conspiracy charged was largely directed from South America by the co-defendant Yolanda Sarmiento who left New York and returned to Argentina to set up her base of operations there after she and her husband had been arrested in New York in April 1970. The fact that Rivera, Torres and Lopez were Yolanda Sarmiento's buyers in New York when she lived and ran her narcotics operations here, is surely probative of the Government's contention that they continued to be her buyers when she moved back to Argentina and a few months later in Buenos Aires started the picture frame smuggling operation. The fact that in April 1970 Redondo had been arrested together with Sarmiento and her husband in New York was vital to the jury's understanding of why she had had to leave New York, return to Argentina, and create a new smuggling operation.

Contrary to Torres' contention the 100 kilos was not pinned on Torres alone by Redondo. Specifically, he said that before the arrest, Torres was supposed to deliver $50,000 to Yolanda (a sum which would hardly account for more than 4 or 5 kilograms) and discuss future deliveries, that Tony was supposed to pick up merchandise—heroin and cocaine—in New York, and that her narcotics "for the most part went to Tony, the old man Lopez and Roberto Rivera." (Tr. 98, 99, 102). Following this testimony Redondo testified that he was arrested with Sarmiento and her husband and charged with the possession of approximately 100 kilos, mostly heroin and cocaine, found at Sarmiento's apartment on West 19th Street.

Furthermore, Redondo was not the only witness to mention the 100 kilos. It came up again during the course of the conspiracy, in a statement in furtherance of the conspiracy from Torres' own mouth. Cancio testified that when Sarmiento's husband, Emilio, was staying in Cancio's girlfriend's apartment in January, 1971, prior to Emilio's return to South America, Tony Torres came to the apartment and had a conversation with Emilio about drugs lost earlier and the fact that he (Tony T) had paid an advance of $25,000 in cash to Emilio and Yolanda for the narcotics. Tony said he wanted to be repaid the $25,000. Emilio objected and said "you know that I have been arrested. We lost 100 kilos and I lose more than you." Tony T responded that regardless of that, he had given the $25,000 in advance and never received the cocaine. Emilio then agreed to repay Tony the $25,000 when Emilio got out of the country and Tony said he would take payment in either cash or coke (Tr. 834-835). This conversation foreshadowed the subsequent testimony of Mazza that Tony Torres was the scheduled buyer for the next Sarmiento picture frame shipment, the March shipment of 10 kilos of heroin and 3 of cocaine.

Mazza also testified that Torres told him when they were negotiating for the purchase by Torres of the March shipment that "on one occasion he had advanced around $20,000 to Yolanda Sarmiento for the purchase of a shipment of drugs, but since the police seized the drugs and Yolanda Sarmiento and her husband were arrested he lost his money" (Tr. 332).

In the present case, as in *United States v. Bozza*, 365 F.2d 206, 214 (2d Cir. 1965), it can safely be said that "the danger that the jury would 'probably be roused by the evidence to overmastering hostility' was minimal." The "temperature generated" by the concededly admissible evidence of the importation and distribution of seven shipments of narcotics concealed in picture frames involving one-sixth of a ton of heroin and cocaine "was not likely to be significantly augmented" by evidence that narcotics

previously had been imported and sold by the same people. *Id.*

Finally, the appellants were more than adequately protected by the District Court's cautionary instructions to the jury as to the limited purpose for which the evidence was received (Tr. 55, 56, 85-86, 1691-1692, 1741-1743).*

POINT IV

There was no error in the failure of the Trial Court to grant a mistrial when jurors saw the defendants in handcuffs in the hall during the lunch break.

Both defendants claim reversible error because the Trial Court failed to grant a mistrial after jurors saw the defendants in handcuffs. The claim is meritless.

During the lunch break on the second day of trial the defendants were accidentally seen in handcuffs in the hallway outside the courtroom by two jurors, one of whom spoke about what he had seen to a third juror. At defendants' request Judge Cannella conducted a thorough voir dire of the three jurors involved, and excused one of them, alternate no. 2, when she indicated that she might be affected by having been told of the handcuffs. The two jurors who had seen the handcuffed prisoners said that the experience would not affect them at all and remained on the jury. They also were instructed not to mention to the other jurors what they had observed. The transcript of the description of the incident in the hallway by defense

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* Judge Cannella also sought to protect appellants' right to a fair trial by excluding Redondo's testimony that Yolando Sarmiento jumped bail on the charge filed against her in April, 1970 and fled to Argentina and that it was Tony Torres who arranged her escape from this country. This evidence was excluded after an offer of proof from the Government even though it was indisputably probative of the close relationship between Sarmiento and Torres (Tr. 106-109).

counsel and of the voir dire conducted by the Court is contained at Tr. 152-156 and Tr. 187-194. The record does not support Torres' contention (Br. at 20) that there was a repetition of the incident. Under the circumstances, the precautions taken by the District Court to assure that there was no prejudice to the defendants were ample and the incident provides no ground for reversal. *United States* v. *Sperling*, 362 F. Supp. 909, 913 (S.D.N.Y. 1973), *aff'd*, 506 F.2d 1323, 1343 n. 30 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3474 (March 3, 1975) and the cases cited therein.*

POINT V

The Court's remarks about hollandaise sauce and the conspiracy were not reversible error.

Rivera cites two remarks by Judge Cannella which are alleged to have been highly prejudicial to Rivera and therefore require a new trial. The point is frivolous.

The first allegedly prejudicial remark about hollandaise sauce and custard arose during the direct examination of Government witness Mazza who was describing a conversation he had had with Ruiz, relating to the completed third shipment of narcotics in picture frames and the preparation for the fourth shipment:

> "Q. Was there anything else said in this conversation?
> A. Well, I don't remember whether there was anything more to the conversation but what I do remember is that I said that there was going to be

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* For his own reasons counsel for Torres decided to raise the issue in his summation and inform all the jurors that the defendants were in custody and kept in handcuffs. At this time the Court instructed all the jurors that the defendants were in custody simply because, for whatever reason, they had not furnished bail (Tr. 1589-1590).

a deal pretty soon, that he should prepare and buy the paintings for the shipment.

Q. Did Ruiz say what the substance had been that had been sent out on the previous load?

Mr. Schwartz: That is objected to, if your Honor please.

The Court: Sustained.

Q. Did Ruiz say anything about the shipment he just described?

Mr. Schwartz: Objection, your Honor.

The Court: I think you ought to go on. The jury has more than enough on this area at this point. Sustained. He already described what Ruiz told him. He said they weren't sending up custard or hollandaise sauce in these frames.

Q. Did you thereafter obtain more narcotics?

Mr. Schwartz: I object to the form of the question, your Honor.

Mr. Brown: Objection.

The Court: Sustained.

Q. Was there another deal which you were involved with?

Mr. Schwartz: May we have a time and place, your Honor?

The Court: Yes. Thereafter, namely, after the middle of March, what, if any, other dealings did you have with Ruiz after March of 1971?" (Tr. 313-314)

Viewed in context of the repeated testimony that the conspirators were smuggling drugs in the frames, and of the introduction into evidence of one set of frames with the drugs, the District Court was only stating the obvious. No prejudice resulted from the remark because defendants never contested that the smugglers were importing drugs.

Furthermore, since there was no objection to the District Judge's remark about "hollandaise saouce" and "custard", the issue was not preserved for review.

The second allegedly prejudicial remark came in response to a request by Rivera's counsel on the seventh day of trial that the Court rule that the testimony concerning conversations and acts of Torres was not binding on Rivera.* After accomplice witness Cancio had described picking up $16,000 from Rivera at Rivera's bar for Miguel, he said he met Tony T at about bar:

"Q. Did you have any conversation with Tony T at the La Barraca?

Mr. Schwartz: I object to the leading, your Honor.

The Court: What, if anything, was said at that time?

The Witness: Well, I saw Tony T, I gave him the message that Miguel had asked me to give him, that he should have the money ready when he came back.

Mr. Schwartz: I object to that and move to strike it out, your Honor, on previously stated grounds.

The Court: Overruled.

A. Then he said to me, "Well, I have the money." Then I said to him, "Well, here is the $2000 I owe you.

Mr. Brown: Your Honor, I am going to ask for a ruling that any and all conversations and transactions with Tony T that are alleged to have been made be not binding on the defendant Rivera.

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* Similar instructions had been given by the Court upon the request of Rivera's or Torres' counsel at least three times before in the trial (Tr. 52-56, 833-834, 908-909). On the last of these occasions Judge Cannella specifically said it was for the jury to find whether a conspiracy had or had not been established (Tr. 909).

The Court: That is not exactly so. Under certain circumstances it wouldn't be binding on him.

The law of conspiracy, I will reput it to you at a later time if it becomes necessary, is very simply put like this: A conspiracy is an agreement between two or more persons to commit an illegal act or to commit a legal act by illegal means.

The way a conspiracy is proven ordinarily is by a series of events, a series of circumstances and certain conversations from which you can deduct whether there was or was not a conspiracy.

If, after discussing all the evidence in the case, the totality of it, you come to the conclusion that there was a conspiracy, then from that point on anybody that is in the conspiracy is bound by the acts and declarations of anybody that is in the conspiracy, whether it is in their presence or not in their presence, whether it is said by them, for them or anything else. They are partners in crime.

So that before this conversation can be binding upon Rivera, you must be satisfied that there is a conspiracy, that the objects of the conspiracy were to violate the narcotics control law to the extent that they were going to import into the United States drugs illegally for the New York market and that he knowingly was a part of that and he took a part in it and participated knowingly, that is, he didn't do it by mistake or through inadvertence or error, but he did it knowingly and that he was looking to further the object of the conspiracy.

Now, the conspiracy we have here is what is called a chain conspiracy. There are a number of kinds of people involved in this. There are financial people at the head of it who finance it; there are people who then get large amounts of drugs,

in this particular case in Chile or in Argentina, for importation into the United States, particularly for the New York market.

Then there are people that were going to transport it and they did. There were people who were going to receive it here, Ruiz, he did. There were people then who were going to buy it in large quantities, and they did, according to the evidence.

That is for you to find. I am not making that finding myself. You may find that from the evidence. You will have to make that determination.

Finally, it gets down to the point where it gets into the street and the small buyers buy it. We do not have any small buyers here. We have so-called buyers that buy in quantities. This particular witness, incidentally, used the drug. I am not aware that any other witness that testified said that he used it. This particular witness did.

So that before this conversation can be binding on Rivera you must find that there was a conspiracy, you must find that the objects of the conspiracy were to illegally import into the United States for the New York market these drugs, and you must find that he became a party to it and was interested in seeing that it succeeded.

So this is taken subject to connection, and if you make all the findings that are necessary by credible evidence beyond a reasonable doubt, it may apply to him.

On the other hand, if you don't, then it may not apply to him. That is the reason you are here: to decide this question of fact which exists in this case.

Mr. Schwartz: Can we go to the side bar, your Honor?

(At the side bar.)

Mr. Schwartz: Your Honor, merely for the record I would like to enter an exception on behalf of the defendant Torres.

The Court: What is the exception?

Mr. Schwartz: Your Honor has made a finding in front of this jury that we have a chain conspiracy here. First of all—

The Court: Where do you find that?

Mr. Brown: You said it.

The Court: I said it is possible for them to find, if they find that beyond a reasonable doubt.

(In open court.)

The Court: I do not suggest that I find that there is a chain conspiracy here. I suggest to you that when you look at the totality of the evidence you may find that there is such a conspiracy here. It is not up to me to make the finding. You are the finders of the fact, not me.

(At the side bar.)

The Court: What else?

Mr. Schwartz: I would ask you to include one thing, if you will, that a person—a person's participation in the conspiracy can only be determined by his own acts and declarations.

The Court: You are way past the law. The other cases are past that? That is not so any more in this district. We will give you the citations and you look them up.

I decline to do that because that isn't the law. That is not the law.

Mr. Schwartz: In any case, I just enter my objection.

The Court: Okay.

Mr. Schwartz: My exception.

Mr. Brown: I do so similarly.

The Court: That is noted" (Tr. 923-928).

In the context of the entire instruction the jury could hardly have thought that the District Court had made a finding that there was a conspiracy especially since they were twice told that the trial judge was not making such a finding. Furthermore, during the charge the District Court instructed the jury that it was the jury's province to determine the facts (Tr. 1729-1730). In any event, Rivera suffered no prejudice from the remark because no one at trial, including either defense counsel, disputed the existence of a conspiracy to smuggle drugs into the United States. Rather, they claimed that the Government had not proved that the defendant's participated in the conspiracy.

POINT VI

The Government's summation was not improper.

Torres contends that the prosecutor in summation made two improper arguments which require reversal of the conviction. The contention is without merit. The prosecutor's arguments, viewed as response to the arguments of defense counsel, were entirely proper. Furthermore, the prosecutor in summation reviewed the evidence in great detail and the allegedly improper remarks would not have distracted the jurors from deciding the case on the evidence, an obligation which the prosecutor at the beginning and end of his summation reminded the jurors was their sworn duty (Tr. 1654-1655, 1725-1726).

The basic thrust of the summation by Torres' counsel was that the Government had acted improperly in making deals with its accomplice witnesses, the South American and Cuban importers of the narcotics, the result of which was that they received lesser sentences than they should have received. The argument was that the smugglers were the real criminals, that they made millions of dollars send-

ing drugs to the United States,* that they were smarter than the prosecutors, they were now taking advantage of us, the Americans, and would testify to whatever the Government suggested.** The argument reached its peak at the close of summation:

> "(W)e are supposed to be in a war against narcotics. We are supposed to be engaged in a war against the importers of drugs . . ." (Tr. 1671) ***

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* "Wladimir Banderas. * * * If you have any simple mathematical ability I will show you that in just what Mr. Banderas admits to he made a total of 4,399,000 American dollars that he took back to Buenos Aires * * * " (Tr. 1605).

** "Do you know, it's a strange thing, but everybody who walked into this court who identified Mr. Torres said, in identifying Mr. Torres, the man in the red jacket. You read the testimony. As to each and every witness who came in here, even agents who came in here, and they all said, the man in the red jacket.

"Mr. Torres has worn a red jacket in this case since it started, and everybody came out and said, the man in the red jacket. They also came out and said, when asked by Mr. Littlefield, and what else do you notice about him that you didn't know before?

"Well, before when I knew him he didn't wear a mustache." Word for word. And I don't say this to you to imply that Mr. Littlefield rehearsed his witnesses, or that Mr. Littlefield suggested or somebody else suggested who they should identify" (Tr. 1595-1586).

(The witnesses are) "com(ing) in here (to) tell the story the government wants" (Tr. 1628).

"The only thing the government wants (the witness) to do is get up there and tell stories" (Tr. 1605-1606).

*** Earlier the argument of Torres' counsel had included the following:

"These (the witnesses) are smugglers, ladies and gentlemen. These are people ten times smarter than we will ever be. Their whole life is a life of crime and deceit and smuggling and lying and cheating. That is how they live and if they can convince half the world, what about we poor Americans" (Tr. 1610).

* * * * *

"I mean, this is incredible. The lengths—who are these people? Who are these people? The Banderas, the Cancio, the Mazzas and the Redondos, who are they?"

[Footnote continued on following page]

"South American nationals or Cuban nationals that come in here looking for help? They are drug importers. They are the people responsible, they are the very source. And are they languishing in American prisons for hundreds of years, the way they are supposed to? No. They are making deals with the Government of the United States to send them home to South America.

"And let me ask you, ladies and gentlemen of the jury, do you for a moment believe that these men live their whole lives smuggling, in crime, and the money was sweet, and they have been educated? Do you think that these people are a match for Mr. Bancroft Littlefield (the prosecutor)? They come out of the streets. These people have pulled themselves up, clawed their way up, shot their way up, did anything, and do you think that agents of the Government are a match for these people?

"They are ten times smarter than you and I will ever be. And when they get back after these deals are consummated, to South America, and they lay low for a while, what do you think they are going to do?

"They have already enjoyed the greatest education that the Government of the United States could give them. They know how it works, they know what to do, and they know how to bargain if their people in the future get caught. What laughs these crooks must have on us when they get back to South America." (Tr. 1624-1625)

* * * * *

"They should be prosecuting Lorenzo Cancio to give him a hundred years. They should be prosecuting Wladimir Banderas to give him a hundred years.

"They should have given Alfredo Mazza a hundred years. They should have given Redondo a hundred years. And there is every reason for you to expect, based upon past performances, that every one of these sweethearts within the next year or two will be out on the street free, that he will be able, as did Mr. Mazza, to ask the Government, do you think you could get me permission to go back to South America, where Mr. Redondo is residing, where he came up from? Oh, I would be forever indebted if you would do that for me.

"Could you imagine Mazza, sitting on the streets of Buenos Aires with his crew of smugglers and narcotics importers, and they say to him, Alfredo, we thought we'd never see you again, and he said, these Americans are crazy; you make a deal and you tell them what they want to do, they give you the country, the Court House, everything, and they send you home (Tr. 1626).

The point of the argument was that the smugglers, these foreign importers, were so bad that the jury should somehow ignore the fact that there were American buyers in the United States. Defense counsel's tactic was to lead the jury to blame only the smuggler's and hope they would forget about the buyers, two of whom the government contended were the defendants on trial.*

In response to this strategy the prosecutor was compelled to remind the jury that the buyers in New York were vital to the smuggling operation, that the money the smugglers made came from the buyers, in short that the buyers were as culpable as the sellers.

> "Prosecutor: Now, your jury service is, of course, a very important duty as other counsel have told you. There is perhaps no higher duty that a citizen can perform in our system than to participate in the effective implementation of justice, which is what the

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* Both defense summations also contained particularly harsh attacks on the Government and its witnesses on accusations outside the record. The witnesses would testify "against anybody that the Government wanted them to testify against" (Rivera Summation, Tr. 1565). One witness "would sell his mother for his own safety" (Rivera Summation, Tr. 1572); others are "beasts" (Rivera Summation, Tr. 1581), "vermin" (Torres Summation, Tr. 1625); one (previously) comes into court and "lies and lies and lie(s) . . . and the Government knew he was lying and a man was convicted" (Torres Summation, Tr. 1619). The same witness who testified he had worked in the Castro Government in Cuba after the revolution was described with no basis in the record as "trained in the revolution to kill people. Comes out of the Sierra Maestre Mountains with Fidel and marches on Havana killing people all the way" (Torres Summation, Tr. 1622).

Additionally, the prosecutor was interrupted so many times at the outset of his summation that the Court had to instruct defense counsel:

"Look, it's very disconcerting for anyone to sum up and be interrupted about 16 or 17 times so far. You know how you can preserve your right" (Tr. 1674).

jury system is. Of course, defense counsel have pointed out at length that one of the functions of the jury is to protect the innocent and of course that is one of the functions of the jury.

But equally important is its other function and that is the function to protect the public from people who are buying narcotics here in New York and enabling these smugglers to go back to South America with all the money. Do you think the smugglers could function if there weren't people in New York to buy narcotics here?

So you can well understand in this case the need of society to be protected against people who are buying these vast amounts of narcotics in New York. Because, after all, we are not talking about sugar or anything like that, we are talking about heroin and cocaine, over 152 kilograms of heroin and cocaine; 330 pounds, almost 1/6th of a ton, bought here by the buyers, including Lopez, Cancio, Tony T, Roberto Rivera, Aviles.

Who is it that pays the bundles of money to these international smugglers if it is not the buyers here in New York, these men, who is it?

Counsel for Torres: Your Honor, I think he is getting into areas that are substantially prejudicial and I object.

The Court: Overruled.

Counsel for Rivera: I will note my objection for the record.

The Court: Overruled.

Prosecutor: No wonder our balance of payments is in such poor condition when money like that is pouring out of the country."

The second allegedly improper remark came at the close of the prosecutor's summation. After reviewing the evidence in great detail (Tr. 1689-1724), the prosecutor told the jury:

> "Perhaps the best way for me to close would be as I began to remind you of your duty and your oath.
>
> Now the decision in the last analysis is up to you and you alone. You have a very serious obligation. Your oath is to well and truly try the case according to the facts and the law as the court shall give it to you.
>
> Nothing more is required of you than abiding by this oath. There is no place for sympathy here. This is not, after all, a case about kids, junkies buying $5 bags in the streets. This is a case about the men, smugglers and buyers, who make it all possible for kids to get hooked.
>
> Roberto Rivera and Anthony Torres, Tony T, the government submits, are guilty beyond any doubt. Accordingly on the evidence they must be found guilty, the Government submits, of conspiracy, and Torres guilty of the charges in counts 2 and 3 and Rivera guilty of the charge in count 4." (Tr. 1725-1726).

The argument here was proper. There *was* no place for sympathy. It *was* a case about the people who smuggle into the United States and buy and sell here large quantities of drugs. The defendants were not singled out for blame. The prosecutor made no distinction between the smugglers, who had been the government's main witnesses, and the buyers, among whom the government contended were the defendants. The use of the colloquial terms "kids," "junkies," "$5 bags," "hooked" was perhaps blunt, but it was nonetheless accurate. Judge Mulligan's observations in *Bynum* concerning the impact on the jury of evidence of crimes of violence in a case involving another large-scale narcotics conspiracy are equally apt here:

> "No jury in New York can be unaware of the dimensions and consequences of the major operation which was graphically portrayed here. The revulsion of

> the average citizen to this traffic need not be documented. How evidence of the concomitant robbery, assault or even planned murder here could be so exacerbating as to render the jury's judgment irrational, we are unable to understand. *We are not dealing with minor league addicted street pushers but with well-financed brazen professionals engaged in a large-scale criminal undertaking . . .*" (Emphasis supplied). 485 F.2d at 499.

Moreover, this is not a case where the prosecutor asked the jury to reach a verdict based on his personal view of the case. Rather the prosecutor in summation repeatedly stressed the evidence and in closing urged the jury to reach a verdict based on the evidence.

Fifty years ago, in *Di Carlo v. United States*, 6 F.2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1924) Judge Learned Hand articulated the proper approach to be taken in cases challenging the propriety of the prosecutor's summation. Speaking for this Court, Judge Hand in that case concluded that there had been no abuse in the comments of the United States Attorney who called upon the jury "to put an end to the rule of the 'dagger and the stiletto', to the 'invisible power behind these defendants'":

> "While, of course, we recognize that the prosecution is by custom more rigidly limited than the defense, we must decline to assimilate its position to that of either judge or jury, or to confine a prosecuting attorney to an impartial statement of the evidence. He is an advocate, and it is entirely proper for him as earnestly as he can to persuade the jury of the truth of his side, of which he ought to be thoroughly convinced before he begins at all. To shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice; it is to deny what has always been an accepted incident of

> jury trials except in those jurisdictions where any serious execution of the criminal law has yielded to a ghostly phantom of the innocent man falsely convicted." *Id.* at 368.

The prosecutor in this case indulged in far less "oratorical emphasis" than that which Judge Hand approved of in *Di Carlo*. Under this Court's decision in *United States* v. *Ramos*, 268 F.2d 878 (2d Cir. 1959), it is perfectly clear that his remarks did not constitute reversible error. In *Ramos* the prosecutor in his summation referred to traffic in narcotics as "a dirty business", a "vicious business", a "sneaky business", and as a "vicious racket" and referred to the purchase price of three ounces of heroin as "representing $1,265 worth of human degradation." Here, as in *Ramos*, the comments complained of were only a small part of a lengthy summation, "the rest of which was devoted to a thorough review of the facts and fair argument thereon." *Id.* at 880. Similarly, "the context suggests that several of the comments were obviously made to mitigate prejudice against the Government for its use, in the prosecution of this case, of informers and undercover men whose credibility had been savagely attacked by defense." *Id.* In concluding that these remarks did not deprive Ramos of a fair trial, this Court declared:

> "[W]e think it not improper for Government counsel in the prosecution of such a case, at least within reasonable limitations, to emphasize the importance of the case by calling attention to the unsavory nature and the social consequences of illicit traffic in narcotics—consequences far more serious than those flowing, for instance, from illicit traffic in lottery tickets or in untaxed liquor."

See also *Chatman* v. *United States*, 411 F.2d 1139, 1142 (9th Cir. 1969).

Viewed in the context of the entire summation and in light of the attacks levelled by defense counsel during their closing arguments, the challenged remarks of Government counsel did not exceed the bounds of fair reply. *United States* v. *Lawn*, 355 U.S. 339, 359 n.15 (1958); *United States* v. *Tramunti*, *supra*, slip op. 2107 at 2164-66; *United States* v. *DeAngelis*, 490 F.2d 1004, 1011 (2d Cir.) (concurring opinion of Mansfield, *J.*), *cert. denied*, 416 U.S. 956 (1974); *United States* v. *Santana*, 485 F.2d 365, 370 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *United States* v. *LaSorsa*, 480 F.2d 522 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *United States* v. *Benter*, 457 F.2d 1174 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972).

In *United States* v. *Stead*, 422 F.2d 183, 184 (8th Cir.), *cert. denied*, 397 U.S. 1180 (1970) the prosecutor in summation told the jury:

> Ladies and gentlemen, I urge you, based upon the evidence in this case, for the good of the community that you represent, rid ourselves of these burglars, sneak thieves in the night * * * and find him guilty as charged.

The Court of Appeals held that these remarks were within permissible bounds:

> The Government's argument, however, was obviously based upon the evidence presented at trial, which evidence was ample to support a finding that Stead was guilty and was a burglar. The Government merely went on to stress to the jury its duty, and the importance of incarcerating a man a jury believes to be guilty of crimes against the community, rather than allowing feelings of mercy to result in an innocent verdict for a guilty man. We believe that even without the cautionary admonition by the Court to the jury this argument was within permissible bounds. (422 F.2d at 184.)

But even if Government counsel's remarks are deemed improper, it is indisputably clear that in this case "a reversal would be an immoderate penalty." *United States* v. *Lotsch,* 102 F.2d 35, 37 (2d Cir.), *cert. denied,* 307 U.S. 622 (1939); see also *United States* v. *Mallah,* 503 F.2d at 979. The evidence here was overwhelming, and the allegedly objectionable remarks were isolated occurrences in an otherwise unchallengeable summation which came at the end of a relatively long and hard fought trial. In light of all the circumstances, the remarks, even assuming that they were unwarranted, could not have had and did not have any impact on the jury. *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 237-43 (1940); *United States* v. *Tortora,* 464 F.2d 1202, 1207 (2d Cir.), *cert. denied,* 409 U.S. 1063 (1972); *United States* v. *Callanan,* 450 F.2d 145, 150-52 (4th Cir. 1971); *United States* v. *Elmore,* 423 F.2d 775, 780-81 (4th Cir.), *cert. denied,* 400 U.S. 825 (1970); *United States* v. *Medelin,* 353 F.2d 789, 795-796 (6th Cir. 1965), *cert. denied,* 384 U.S. 973 (1966); *Marks* v. *United States,* 260 F.2d 377, 383 (10th Cir. 1958), *cert. denied,* 358 U.S. 929 (1959).*

POINT VII

The trial as a whole was not unfair to Rivera.

Rivera's final contention is that even if not one of the specific points raised on appeal calls for reversal the cumulative effect of all of them combined with the fact that the evidence against Rivera was indirect and circumstantial requires reversal. The argument is frivolous. As discussed in the several points above, there were no errors constituting

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* Furthermore, defense counsel did not object to the last remarks which it is now alleged were improper, *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 239; *United States* v. *Perez,* 426 F.2d 1073 (2d Cir. 1970), *aff'd,* 402 U.S. 146 (1971); *United States* v. *Briggs,* 457 F.2d 908 (2d Cir.), *cert. denied,* 409 U.S. 986 (1972); *United States* v. *Benter, supra,* 457 F.2d at 1175.

a course of prejudice which deprived Rivera of his constitutional right to a fair trial. The trial was conducted with fairness by Judge Cannella. The District Court's charge on accomplice witnesses upon whom the Government based its case was, if anything, favorable to the defendants (Tr. 1741-1749). The evidence against Rivera was not all indirect and circumstantial and even if it were, on appeal must be taken in light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Tropiano*, 418 F.2d 1069, 1074-1075 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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BANCROFT LITTLEFIELD, JR.,
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- Affidavit of Service by Mail

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